80472-9

No: 35247-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CHARLES SALES and
PATRICIA SALES, a married couple,

Respondents,

v.

WEYERHAEUSER COMPANY,
a Washington Corporation,

Petitioner.

Published Opinion filed on April 24, 2007

PETITION FOR REVIEW

Diane J. Kero, Esquire
Elizabeth P. Martin, Esquire
Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, L.L.P.
One Union Square
600 University, Suite 2100
Seattle, Washington 98101
Telephone: (206) 676-7545
Fax: (206) 676-7575

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A. IDENTITY OF PETITIONER

Petitioner, Weyerhaeuser Company ("Weyerhaeuser"), by and through its counsel of record, asks this Court to accept review of the Washington Court of Appeals' published decision identified in paragraph B of this petition.

B. THE COURT OF APPEALS' DECISION

Weyerhaeuser seeks review of a published decision of the Washington Court of Appeals, Division II: *Sales v. Weyerhaeuser Co.*, _ Wn. App. _, 156 P.3d 303 (2007), *reconsideration denied*, June 22, 2007. Weyerhaeuser asks the Court to review the Court of Appeals' order instructing the Superior Court of Pierce County to condition dismissal of the case on "Weyerhaeuser's stipulation to proceed in the Arkansas state courts." Weyerhaeuser does not contest the Court of Appeals' finding that the Superior Court's decision granting a dismissal of the case in Pierce County, Washington was proper and does not ask the Court to review this portion of the Court of Appeals' decision. Copies of the Court of Appeals' April 24, 2007, Opinion and June 22, 2007, Order denying Weyerhaeuser's Motion for Reconsideration are included in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' decision conditioning dismissal of the case on Weyerhaeuser's waiver of its federal right to diversity

jurisdiction violate the Supremacy Clause to the U.S. Constitution and the U.S. Supreme Court's "unconstitutional conditions" doctrine?

2. Did the Court of Appeals err when it held the Superior Court abused its discretion by failing to condition dismissal of the case on Weyerhaeuser's stipulation to try the case in Arkansas state court where there is no precedent for such a condition and where the decision is inconsistent with settled Washington law?

3. Does the Court of Appeals' published decision substantially and improperly abridge the rights of Washington-based corporations defending lawsuits that ought to be brought elsewhere?

D. STATEMENT OF THE CASE

1. Factual Background.

Plaintiff Charles Sales ("Plaintiff Sales") and his wife, Patricia Sales, filed this lawsuit alleging Plaintiff Sales developed mesothelioma as a result of exposure to asbestos fibers brought home from Weyerhaeuser's Mountain Pine, Arkansas facility on his father's work clothes between 1984 and 1992. *See* CP at 16–17. Plaintiffs specifically allege Weyerhaeuser used asbestos-containing materials at its "plywood and 2x4 production mill in Mountain Pine, Arkansas" and that Sales' father, Charles D. Sales, "was an employee at this mill" from 1984 to 1992. *Id.* at 16. Plaintiffs further allege (1) Plaintiff Sales' father was "regularly

exposed to asbestos-containing products and materials at the work place" between 1984 and 1992; (2) this exposure "resulted in the regular, systematic, continuous ... accumulation of dust on his clothing and his person;" and, (3) Plaintiff Sales' father unwittingly transported this dust to the home where he and Plaintiff Sales lived. *Id.* Plaintiffs further allege Plaintiff Sales was born on May 13, 1984 and "grew up in Mountain Pine, Arkansas." *Id.* at 16–17. Plaintiffs currently reside in Hot Springs, Arkansas. *See id.* at 15. Plaintiffs do not allege: (1) that they ever resided in Washington; (2) that they ever worked in Washington; (3) that exposure to asbestos occurred in Washington; or, (4) that they sustained any injury in Washington. *See id.* at 14–20. Based on these facts, the Superior Court found, and the Court of Appeals affirmed, that Arkansas is the proper forum for this case. *See* CP at 161 (stating "it would be in the interests of justice to have this case tried in the county and location where the incident occurred, where the majority of the factual witnesses are located, and where the Plaintiff resides"); *see* Op. at 7 (A-7) (stating "record supports the trial court's findings and its legal conclusion that Arkansas is a more appropriate forum for Sales' lawsuit").

2. Procedural Background.

Plaintiffs filed their First Amended Complaint in the Superior Court for Pierce County, Washington on or about May 18, 2006. *See* CP

at 14–20. Weyerhaeuser was the only defendant named in the lawsuit. Weyerhaeuser filed its Motion and Memorandum to Dismiss for *Forum Non Conveniens* on June 13, 2006. *See id.* at 45–53. The parties presented oral arguments regarding Weyerhaeuser's motion on June 23, 2006. *See id.* at 153–55. On June 28, 2006, Judge John R. Hickman issued a seven (7) page written opinion granting Weyerhaeuser's motion to dismiss. *See id.* at 156–62.

Plaintiffs filed their Motion for Reconsideration with the Superior Court on July 17, 2006. *See id.* at 169–90. The parties presented oral argument on Plaintiffs' motion on July 28, 2006. *See id.* at 462–63. Judge Hickman denied Plaintiffs' motion on the same day. *See id.* at 464. Plaintiffs filed their Notice of Appeal to Division II of the Washington Court of Appeals on August 25, 2006. *See id.* at 473–87. Thereafter, the parties presented briefs and oral argument to the Court of Appeals. On April 24, 2007, the Court of Appeals issued a published decision reversing and remanding the case to the Superior Court with instructions to condition dismissal on Weyerhaeuser's stipulation to try the case in the Arkansas state court system. *See* Op. at 11 (A-11). Weyerhaeuser filed a Motion to Reconsider on May 14, 2007. After ordering Plaintiffs to file a response to Weyerhaeuser's motion, the Court of Appeals denied Weyerhaeuser's motion on June 22, 2007. *See* Order (A -12).

E. ARGUMENT

1. Summary of Argument Justifying Supreme Court Review.

This Court should review the Court of Appeals' decision because it creates a significant question of law under the U.S. Constitution. RAP 13.4(b)(3). On its face, the Court of Appeals' decision unconstitutionally requires Weyerhaeuser to waive its constitutional right to diversity jurisdiction in violation of the U.S. Constitution's Supremacy Clause and the "unconstitutional conditions" doctrine established by the U.S. Supreme Court. While a court can condition dismissal on a defendant's voluntary stipulation that it will submit to *jurisdiction* in the defendant's proposed adequate alternative forum, a court cannot take the next step and condition dismissal on the defendant's *waiver* of its constitutional right to federal diversity jurisdiction.

The Court of Appeals' published opinion also conflicts with past precedent from the Washington Supreme Court and Court of Appeals. RAP 13.4(b)(1)–(2). Specifically, the Court of Appeals ignored binding precedent when it held the Superior Court abused its discretion by failing to condition dismissal of the case on Weyerhaeuser's stipulation to try the case in Arkansas state court. As explained below, the Superior Court recognized it had the general authority to impose conditions on the dismissal of the case; properly analyzed and considered the issue; and,

decided against conditioning dismissal. Similarly, the Superior Court correctly applied Washington's law when determining whether Arkansas was an adequate alternate forum for the trial of this case. Stated simply, the Superior Court understood and correctly interpreted Washington's law on *forum non conveniens* and did not abuse its discretion in any way.

Weyerhaeuser further submits this petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). The Court of Appeals' published opinion potentially affects any Washington-based corporation by expressly allowing a plaintiff to file a claim that is factually unrelated to this state while avoiding what otherwise would be proper federal diversity jurisdiction in the appropriate forum. In other words, the Court of Appeals' published decision abrogates the rights of Washington-based corporations and condones and encourages forum shopping.

2. The Court of Appeals' Decision Unconstitutionally Preempts the Federal Judicial System.

a. Constitutional Right to Diversity Jurisdiction and Supremacy Clause to U.S. Constitution.

The U.S. Constitution creates the right to federal diversity jurisdiction: "The judicial Power [of the United States] shall extend ... to Controversies ... between a State and Citizens of another State; – between Citizens of different States." U.S. Const. art. III, § 2, cl. 2. The right to

federal diversity jurisdiction is codified in 28 U.S.C. section 1332: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between ... [c]itizens of different States." 28 U.S.C. § 1332(a)(1) (2007). Section 1441 codifies a defendant's right to remove a case to federal court under diversity jurisdiction:

> *[A]ny civil* action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Id. § 1441(a) (emphasis added); *see also Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97, 42 S. Ct. 35, 37, 66 L. Ed. 144, 148 (1921).

The U.S. Constitution's Supremacy Clause prevents a state from violating a defendant's right to federal diversity jurisdiction:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2 (emphasis added). "[W]hen state law touches upon the area of federal statutes enacted pursuant to constitutional authority, 'it is "familiar doctrine" that the federal policy "may not be set

at naught, or its benefits denied" by the state law.'" *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479–80, 94 S. Ct. 1879, 1885, 40 L. Ed. 2d 315, 324 (1974) (citation omitted); *Howlett v. Rose*, 496 U.S. 356, 371, 110 S. Ct. 2430, 2440, 110 L. Ed. 2d 332, 350 (1990) ("the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source"); *Int'l Ins. Co. v. Duryee*, 96 F.3d 837 (6th Cir. 1996) (noting the Supremacy Clause makes state statutes unconstitutional if they conflict with federal law). Simply understood, the Supremacy Clause prevents a state court from discriminating against federal law – regardless of the state court's opinion of the federal law.

By conditioning an otherwise proper dismissal for *forum non conveniens*, the Court of Appeals decision violates the Supremacy Clause by forcing Weyerhaeuser to waive its constitutional right to federal diversity jurisdiction and stipulate to try the case in Arkansas state court. The Court of Appeals' decision is in direct conflict with Weyerhaeuser's constitutional right to federal diversity jurisdiction. The U.S. Constitution gives Weyerhaeuser the right of federal diversity jurisdiction and the Washington Court of Appeals cannot, in any way, prevent, defeat or limit Weyerhaeuser's ability to assert this right. Thus, the Court of Appeals cannot require Weyerhaeuser to waive its right to federal diversity

jurisdiction as a condition for granting Weyerhaeuser's motion to dismiss. Any attempt to tread upon Weyerhaeuser's federal right to diversity jurisdiction is unconstitutional.

At its foundation, the Court of Appeals' decision overlooks the distinction between a defendant's stipulation to jurisdiction in a proposed alternative forum and a *court imposed mandate* forcing a defendant to waive its constitutional right to federal diversity jurisdiction. Under the former, a defendant merely agrees it will not contest jurisdiction in the alternative forum. The latter exceeds the defendant's stipulation to jurisdiction and forces the defendant to waive its constitutional rights. The former simply precludes the defendant from arguing the proposed forum is improper or that another forum is more convenient.

Significantly, a defendant's stipulation to jurisdiction, does not effectuate a waiver of a defendant's right to federal diversity jurisdiction. A defendant's stipulation to jurisdiction in the proposed alternative forum is fundamentally different from a stipulation that the defendant will *never* seek to remove a case to federal court should the case be removable. A defendant stipulating to jurisdiction in its proposed alternative forum retains the right to assert federal diversity jurisdiction. This stipulation does not require the waiver of any constitutional rights.

The Court of Appeals' decision also overlooks the fact that Weyerhaeuser does not control whether Plaintiffs file a case that is ultimately removable. Plaintiffs are the "masters" of their Complaint and determine who to sue, when to sue and where to sue. Weyerhaeuser is left to react to Plaintiffs' actions in this case. The Court of Appeals had no greater knowledge than the Superior Court as to whether Plaintiffs will attempt to add a local defendant to frustrate any potential removal of the case to federal court. This Court should not allow the Court of Appeals to trod upon Weyerhaeuser's constitutional rights simply because the Court of Appeals *assumes* Plaintiffs will fail to name a non-diverse defendant in any case they may file in Arkansas.

b. The "Unconstitutional Conditions Doctrine."

The U.S. Supreme Court's longstanding "unconstitutional conditions" doctrine also prohibits the Court of Appeals' from conditioning the discretionary dismissal of the case on Weyerhaeuser's waiver of its constitutional right to federal diversity jurisdiction. The "unconstitutional conditions" doctrine holds a government may not grant a benefit on the condition that the beneficiary surrenders a constitutional right – even if the benefit is discretionary and the government has the right to withhold the benefit entirely. *See, e.g., Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 598, 46 S. Ct. 605, 609, 70 L. Ed. 1101, 1107

(1926) (stating "a state is without power to impose an unconstitutional requirement as a condition for granting a privilege").

Significantly, the U.S. Supreme Court also has held states may not infringe upon a defendant's federal right of removal:

> *It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious.*

Harrison v. St. Louis & San Francisco R.R., 232 U.S. 318, 327, 34 S. Ct. 333, 335, 58 L. Ed. 621, 624 (1914) (emphasis added); *Goldey v. Morning News*, 156 U.S. 518, 523, 15 S. Ct. 559, 561, 39 L. Ed. 517, 519 (1895) (stating "[t]he judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal"); *Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs.*, 4 F.3d 614, 619 (8th Cir. 1993) (stating "states cannot indirectly prevent, defeat, or limit the free exercise of the right to remove"). Indeed, the U.S. Supreme Court has specifically stated the right to remove is an "absolute right" upon which states cannot impose unconstitutional conditions:

> "The Constitution of the United States secures to citizens of another state than that in which suit is brought an absolute right to remove their cases into the Federal court, upon compliance with the terms of the removal statute."

Home Ins. v. Morse, 87 U.S. 445, 22 L. Ed. 365 (1874); *Terral v. Burke Constr. Co.*, 257 U.S. 529, 42 S. Ct. 188, 66 L. Ed. 352 (1922); *Barron v. Burnside*, 121 U.S. 186, 198, 7 S. Ct. 931, 935, 30 L. Ed. 915, 919 (1887) (stating that the U.S. Supreme Court "has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States"). A state court cannot exact from a defendant "a waiver of the exercise of its constitutional rights to resort to federal court." *Terral*, 257 U.S. at 532, 42 S. Ct. at 189, 66 L. Ed. at 354 (holding unconstitutional an Arkansas statute which revoked a foreign corporation's license to conduct local business if the corporation invoked its federal right to diversity jurisdiction).

The Court of Appeals' decision violates the "unconstitutional conditions" doctrine by conditioning dismissal of the case on Weyerhaeuser's waiver of its right to federal diversity jurisdiction. The Court of Appeals has given Weyerhaeuser a "choice between the rock and the whirlpool." *See Frost & Frost Trucking Co.*, 271 U.S. at 593, 46 S. Ct. at 607, 70 L. Ed. at 1104. Weyerhaeuser can try the case in

Washington – where the case has no factual connection and where Weyerhaeuser will be unable to subpoena necessary fact witnesses – or waive its right to federal diversity jurisdiction. The Court of Appeals' decision gives Weyerhaeuser a choice that is really no choice at all. This is precisely the Hobson's choice that the "unconstitutional conditions" doctrine prohibits.

3. The Court of Appeals' Decision Conflicts with Past Precedent from Washington Supreme Court and Court of Appeals.

a. The Superior Court Did Not Abuse Its Discretion When It Dismissed the Case Without Conditioning Dismissal.

The Court of Appeals' holding that the Superior Court abused its discretion conflicts with past precedent from the Washington Supreme Court and Court of Appeals and involves an issue of substantial public interest that should be determined by the Supreme Court. In reversing the Superior Court, the Court of Appeals redefined what constitutes abuse of discretion in the context of a court's ruling on a motion to dismiss for *forum non conveniens*.

The Supreme Court of Washington has held a trial court abuses its discretion in granting a motion to dismiss on *forum non conveniens* only if its decision is "'manifestly unfair, unreasonable or untenable.'" *Myers v. Boeing Co.*, 115 Wn. 2d 123, 128, 794 P.2d 1275, 1276 (1990) (citation omitted). The proper test for abuse of discretion is not whether another

court might have or even would have ruled the same way. The test is whether the trial court based its decision on tenable grounds and reasons. *See Coggle v. Snow*, 56 Wn. App. 499, 506, 784 P.2d 554, 559 (1990). As stated by the Court of Appeals in *Coggle*:

> The precise meaning of discretion is affected by the reasons and the purposes for which the decisionmaker is to exercise his or her discretion. Discretion may mean that the decisionmaker is not bound by standards; on the other hand, it may mean simply that the decisionmaker must exercise judgment in applying certain standards or that he or she has final authority in the matter, without review by other authority. ... [T]he central idea of discretion is *choice*: the court has discretion in the sense that there are no "officially wrong" answers to the questions posed.

Coggle, at 56 Wn. App. at 50, 784 P.2d at 558. Reversal is not appropriate unless "no reasonable judge would have reached the same conclusion." *Sofie v. Fiberboard Corp.*, 112 Wn. 2d 636, 667, 771 P.2d 711, 727 (1989).

The record in this case evidences the Superior Court understood and correctly interpreted Washington's law on *forum non conveniens* and did not base its holding on an erroneous view of the law. There is simply no basis for the Court of Appeals' holding that the Superior Court abused

its discretion when it declined to condition dismissal of the case on Weyerhaeuser's agreement to try the case in Arkansas state court system.

In its written opinion, the Superior Court stated:

> *In reviewing the cases cited by counsel,* the courts do not necessarily require that the case be heard in the jurisdiction where the alleged incidents took place. The courts' main concern is holding these trials in the areas in which the most information is available to the parties, which is key to the disposition of the case . . ..

CP at 161 (emphasis added). The Superior Court also specifically cited *Myers v. Boeing Company* and *Johnson v. Spider Staging Corp.*, 87 Wn. 2d 577, 555 P.2d 997 (1976) – two cases in which trial courts imposed conditions on *forum non conveniens* dismissals. *See* CP at 161.

Similarly, the Superior Court specifically acknowledged it did not believe that speculating on what might happen if Weyerhaeuser removed the case to the Multi-District Litigation ("MDL") was a proper basis on which to deny Weyerhaeuser's motion:

> I do believe that I would be speculating in terms of what kind of problems this case will face if I were to simply ... keep it here, simply to avoid the diversity jurisdiction that Counsel was so concerned about, and the fact that it may end up in Pennsylvania.

RP at 15:9–14 (Tr. from Hr'g on Pls.' Mot. to Recons., 7/28/06). The Superior Court also repeatedly acknowledged it carefully reviewed the

case law cited in the parties' briefs. *See* CP at 161; RP at 14:10–12 (Tr. from Hr'g on Pls.' Mot. to Recons., 7/28/06).

Plaintiffs also emphasized the Superior Court's authority to condition dismissal in their Motion for Reconsideration and specifically argued the Superior Court should require Weyerhaeuser to submit to Arkansas jurisdiction as a condition for securing dismissal in Washington. *See* CP at 185–86. Plaintiffs' counsel also argued this point during the hearing on Plaintiffs' Motion to Reconsider. *See* RP at 5:2–6:11 & 7:6–14 (Tr. from Hr'g on Pls.' Mot. to Recons., 7/28/06) ("Therefore, I believe, your Honor, that in order to effectuate this transfer under the interests of justice and under Washington law the Court should have asked *Weyerhaeuser to stipulate not to remove the case to federal court.*"). Similarly, Weyerhaeuser's Opposition to Plaintiffs' Motion for Reconsideration analyzed the limitations placed on the Superior Court's authority to condition dismissal. *See* CP at 428–29, 446–47.

The Superior Court granted Weyerhaeuser's Motion to Dismiss and denied Plaintiffs' Motion for Reconsideration because the court rightly concluded the possibility of federal removal was not "a legitimate factor" it could consider when deciding Weyerhaeuser's motion:

> I came to realize, obviously, that the only reason that this case is in Washington State is potentially to avoid this diversity of

> jurisdiction so that the federal government or the federal court system would not be involved in it, and I believe that was a strong motivation in filing it here in Washington State. And, in fact, on your Motion For Reconsideration, that is probably the main argument that you make, is that you don't want to get involved in what you believe, what has been indicated to the Court, to be a cragmier [sic]. *But, the problem is that I don't believe that this Court has read any cases that would allow me under that fact pattern to use that as a* ***sole*** *reason for keeping jurisdiction over a case which otherwise the State of Washington has only what I consider to be a very thin connection.*

RP at 14:13–15:2 (Tr. from Hr'g on Pls.' Mot. to Recons., 7/28/06) (emphasis added); *see also id.* at 15:15–23. The Court of Appeals' decision is in direct conflict with Washington's well-established criteria as to what constitutes abuse of discretion, and its conclusion that the Superior Court abused its discretion finds no support in the record.

b. The Court of Appeals Has Improperly Altered and Misapplied Washington's Test for *Forum Non Conveniens*.

The Court of Appeals' decision adds an unconstitutional and previously unrecognized element to Washington's test for *forum non conveniens*. Prior to the Court of Appeals' published decision in this case, Washington courts evaluating the adequacy of a defendant's proposed alternative forum did not consider whether the defendant would assert its

right to federal diversity jurisdiction in that forum. Rather, Washington courts traditionally focus solely on whether the plaintiff has at least *some* remedy and can litigate the essential subject matter of the dispute in the proposed alternative forum. *See, e.g., Klotz v. Dehkhoda*, 134 Wn. App. 261, 265, 141 P.3d 67, 68 (2006) (stating "an alternative forum is adequate so long as some relief, regardless how small, is available should the plaintiff prevail"); *see also Hill v. Jawanda Transport*, 96 Wn. App. 537, 542, 983 P.2d 666, 670 (1999) (holding British Columbia was an adequate alternative forum because plaintiffs could "clearly litigate the essential subject matter of their dispute and recover damages for their losses"). In this case, the Court of Appeals' improperly ignored this precedent and stated Arkansas would not be an adequate alternative forum unless Weyerhaeuser not only showed the plaintiff had a remedy in Arkansas, but also waived its constitutional right to federal diversity jurisdiction and agreed to try the case in the Arkansas state court system.

Similarly, the Court of Appeals misapplied Washington's law on *forum non conveniens* when it adopted Plaintiffs' argument that Weyerhaeuser failed to prove that Arkansas is an adequate alternative forum because "Weyerhaeuser did not establish that it would be the *real* forum." Op. at 5–6 (A-5–A-6). There is no precedent for such a requirement. Further, this statement suggests the Court of Appeals

misunderstood the federal MDL process, whereby cases are transferred back to the local federal courts for trial after pretrial handling. *See, e.g.*, CP at 458–59. Regardless of whether the case proceeds in Arkansas state or federal court, the case will be tried in Arkansas, not Pennsylvania. This misapprehension appears to be a major underpinning of the Court of Appeals' erroneous decision.

4. The Court of Appeals' Decision Has an Adverse Impact on All Washington Corporations, Including Weyerhaeuser.

In addition to the reasons discussed above, the Court should review the Court of Appeals' decision because it "involves an issue of substantial public interest." Unless reversed on appeal, the Court of Appeals' decision will embolden future plaintiffs to forum shop and eviscerate a Washington defendant's constitutional right to remove diverse cases to federal court. Future plaintiffs will cite the Court of Appeals' decision and argue a defendant's proposed adequate alternative forum is inadequate unless the defendant agrees to waive its constitutional right to diversity jurisdiction and try the case in state court. This argument could be raised not only in asbestos cases, but also in any other cases where the possibility of "delay" at the federal level (whether on account of an MDL proceeding or general docket congestion) could be referenced. By way of illustration, the U.S. Judicial Panel on Multidistrict Litigation reports there are

currently 295 active MDLs in the United States. If the Court of Appeals' decision impacted only half of the Washington defendants involved in these MDLs, the opinion would be of "substantial public interest." Moreover, there are approximately 550 asbestos cases pending in King County. It is beyond dispute that the Court of Appeals' decision impacts the Washington-based defendants in these cases. If this Court allows this decision to stand, the *possibility* of removal will become the dispositive factor in Washington's *forum non conveniens* analysis – trumping both the balancing test and public and private interest factors outlined in *Myers v. Boeing Company*.

F. CONCLUSION

For the foregoing reasons, Weyerhaeuser asks this Court to accept review of *Sales v. Weyerhaeuser Co.*, _ Wn. App. _, 156 P.3d 303 (2007), a published decision of the Washington Court of Appeals, Division II.

DATED this 20th day of July, 2007.

Respectfully Submitted,

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM, LLP

Diane J. Kero, WSBA No. 11874
dkero@gth-law.com
Elizabeth P. Martin, WSBA No. 12940
emartin@gth-law.com

Attorneys for Petitioner Weyerhaeuser Company

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHARLES SALES and PATRICIA SALES, a married couple, Appellants, v. WEYERHAEUSER COMPANY, a Washington corporation, Respondents.	No. 35247-8-II PUBLISHED OPINION

ARMSTRONG, P.J. -- Charles Sales's father worked with asbestos-containing materials at a Weyerhaeuser Company (Weyerhaeuser) mill in Arkansas during Sales's childhood. After doctors diagnosed Sales, an Arkansas resident, with mesothelioma, he filed a personal injury action in Pierce County, Washington against Weyerhaeuser Company, alleging that his father brought home asbestos dust on his clothing that exposed Sales to the asbestos and caused him to develop mesothelioma. On Weyerhaeuser's motion to dismiss for an inconvenient forum, the trial court dismissed this action, ruling that Sales should have filed the action in Arkansas. Sales presented evidence that if he filed the case in Arkansas, Weyerhaeuser would likely remove the case to federal court, where it would be transferred to the asbestos Multi-District Litigation in the Eastern District of Pennsylvania, a venue that could significantly delay Sales's trial. Because Sales's condition is terminal, any significant delay could deprive him of his day in court.

Although the trial court considered the possible delay, it believed it could not speculate whether Weyerhaeuser would transfer the case to federal court. The trial court also apparently believed that it could not require Weyerhaeuser to stipulate to trying the case in Arkansas state court. We reverse and remand for the trial court to dismiss the case on the condition that Weyerhaeuser stipulate to allowing the case to continue in Arkansas state court.

FACTS

Weyerhaeuser is a Washington corporation. During the relevant time, Weyerhaeuser owned and operated a mill in Mountain Pine, Arkansas. Charles Sales's father worked at the Mountain Pine mill from 1984 until 1992. Sales was born in 1984 and lived with his father during the eight years his father worked at the mill.

After doctors diagnosed Sales with mesothelioma, he filed a personal injury action in Pierce County against Weyerhaeuser. The complaint alleged that Sales's father's job exposed him to asbestos dust, which he brought home on his clothing, and thereby exposed Sales to the asbestos and caused his mesothelioma.

Weyerhaeuser moved to dismiss on the theory that Arkansas, and not Washington, is the proper forum because Sales and a number of witnesses live there, and the injury occurred there.

Sales claimed that Washington is the proper forum because several key witnesses live in Washington and because Weyerhaeuser is headquartered in Washington. Sales also argued that if he re-filed his lawsuit in Arkansas, Weyerhaeuser would likely remove the case to federal court, based on diversity jurisdiction, where it would be transferred to the asbestos Multi-District Litigation in the Eastern District of Pennsylvania. Sales argued that a trial in Pennsylvania would inconvenience all parties and that the practical effect of re-filing the claim in Arkansas

would do nothing to address the convenience arguments Weyerhaeuser raised in its motion to dismiss.

The trial court dismissed the case, ruling that the trial should take place in Arkansas "since that is the state in which the alleged injuries took place and where [Sales] resides and is being treated." Clerk's Papers (CP) at 160. The court found that "[t]here is no real causal connection for this case to Washington . . . other than the fact that Weyerhaeuser's corporate headquarters [are] located here." CP at 160. With respect to Sales's argument that Weyerhaeuser sought dismissal so that it could remove the case to federal court, the court said that the interests of justice required the case to proceed before an Arkansas court. Nonetheless, it stated that it could not "speculate on whether . . . this case would be removed . . . or [regarding] the status . . . of [asbestos] case[s]" in the federal system.[1] CP at 161.

Sales moved the trial court to reconsider, arguing that it misused the inconvenient forum doctrine and essentially provided Weyerhaeuser with a "back[ ]door" into federal court. CP at 187. Alternatively, Sales argued that the court should have conditioned dismissal on Weyerhaeuser's stipulation to try the case in Arkansas state court. The trial court denied Sales's motion for reconsideration.

The principal issue on appeal is whether the trial court erred in dismissing the action without requiring Weyerhaeuser, as a condition of the dismissal, to stipulate to trying the case in Arkansas state court. We hold that the trial court erred in not conditioning the dismissal.

[1] As discussed below, evidence suggests that the magnitude of the multi-district litigation for asbestos personal injury actions prevents the expedient and efficient litigation of claims.

ANALYSIS

I. STANDARD OF REVIEW

Trial courts have discretionary power to decline jurisdiction when resolving the action in another forum would better serve the parties' convenience and the ends of justice. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579, 555 P.2d 997 (1976) (citing *Werner v. Werner*, 84 Wn.2d 360, 370, 526 P.2d 370 (1974)). We review a dismissal based on inconvenient forum for an abuse of discretion. *Myers v. Boeing Co.*, 115 Wn.2d 123, 128, 794 P.2d 1272 (1990). A court abuses its discretion in dismissing a case due to an inconvenient forum if the dismissal is "'manifestly unfair, unreasonable[,] or untenable.'" *Myers*, 115 Wn.2d at 128 (quoting *Gen. Tel. Co. v. Utils. & Transp. Comm'n*, 104 Wn.2d 460, 474, 706 P.2d 625 (1985)).

Generally, the plaintiff gets to chose the forum. *Hatley v. Saberhagen Holdings, Inc.*, 118 Wn. App. 485, 488, 76 P.3d 255 (2003) (quoting *Baker v. Hilton*, 64 Wn.2d 964, 965, 395 P.2d 486 (1964)). Although a plaintiff cannot choose an inconvenient forum merely to vex or harass a defendant, we will rarely disturb the plaintiff's forum choice. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947), *superseded by statute*, Former 28 U.S.C. § 1404(a) (1948).

II. EXISTENCE OF AN ADEQUATE ALTERNATIVE FORUM

To obtain a dismissal for inconvenient forum, Weyerhaeuser, as the party seeking dismissal, needed to show that Arkansas constituted an adequate alternative forum. *Hill v. Jawanda Transp. Ltd.*, 96 Wn. App. 537, 541, 983 P.2d 666 (1999) (citing *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 677 (D.C. Cir. 1996)). An alternative forum is adequate so long as some relief, regardless how small, is available if the plaintiff prevails. *Klotz v. Dehkhoda*, 134 Wn.

App. 261, 265, 141 P.3d 67 (2006) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)).

Here, Weyerhaeuser did not argue below that Arkansas is an adequate alternative forum. Moreover, the trial court did not expressly find that Arkansas constituted an adequate alternative. Sales argues that because the court failed to expressly find that Weyerhaeuser satisfied the threshold burden of establishing an adequate alternate forum, we should reverse the trial court's dismissal.

An alternate forum is adequate as long as a plaintiff can litigate the essential subject matter in the alternate forum and recover if successful. *See Piper*, 454 U.S. at 254. Arkansas state courts recognize a tort action for damages caused by asbestos exposure. *See, e.g., Deitsch v. Tillery*, 833 S.W.2d 760 (Ark. 1992) (plaintiffs sued a school district alleging negligence against the district and the school board and claiming that the school knew or should have known of the presence of asbestos in an elementary school and failed and refused to correct the condition).

Sales's counsel argued that "[a]ll [Weyerhaeuser had] to do is say, 'We will allow the case to be heard in Arkansas,'" that "Weyerhaeuser repeatedly could have stipulated that they [would] allow the case to proceed to trial in Arkansas and they haven't done so," that "we've given Weyerhaeuser repeated opportunities to stipulate to allow the case to proceed to trial in Arkansas." Report of Proceedings (July 28, 2006) at 7-8. Thus, Sales's counsel conceded that Arkansas state court *could* provide an adequate forum.

Finally, the trial court found that Arkansas's state court system and trial date availability is "equal to, or comparable to, Pierce County." CP at 159; *see Sablic v. Armada Shipping ApS*,

973 F. Supp. 745, 748 (S.D. Tex. 1997) (proposed alternative forum inadequate because a backlog of cases posed the possibility of a lengthy delay in the resolution of the plaintiff's case).

But Sales contends that Weyerhaeuser failed to prove that Arkansas is an adequate alternative forum because Weyerhaeuser did not establish that Arkansas would be the *real* forum. We agree and because the issue is so entwined with the trial court's power to condition a dismissal on Weyerhaeuser's stipulation to Arkansas as the more convenient forum, we discuss the two together below.

III. Balancing Criteria for Determining the Appropriate Forum

In *Gulf Oil*, the United States Supreme Court set forth the criteria for determining an appropriate forum. *Gulf Oil*, 330 U.S. at 508. Washington adopted the *Gulf Oil* factors in *Johnson v. Spider Staging Corp. Johnson*, 87 Wn.2d at 579. In recognizing that the trial court has discretion to determine whether an alternate forum is more convenient, the Supreme Court has set out a list of private and public interest factors for courts to consider and balance. *Myers*, 115 Wn.2d at 128.

Courts should consider the following private interests:

> [1] the relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling [witnesses]; . . . [3] the cost of obtaining attendance of willing, witnesses; [4] possibility of view of premises, if view would be appropriate to the action; and [5] all other practical problems that make trial of a case easy, expeditious and inexpensive.

Myers, 115 Wn.2d at 128 (quoting *Gulf Oil*, 330 U.S. at 508). Unless the balance of these private factors "is strongly in favor of the defendant," courts should rarely disturb the plaintiff's choice of forum. *Gulf Oil*, 330 U.S. at 508.

Courts should also consider the following public interest factors in determining an appropriate forum: (1) administrative difficulties in congested courts not at the origin of the

litigation; (2) the burden of jury duty on a community that has no relation to the litigation; (3) the proximity between the trial's location and the people the case affects; (4) the interest in having local controversies decided locally; and (5) the desireability of trying the case in a jurisdiction familiar with the state law that governs the case. *Myers*, 115 Wn.2d at 129 (quoting *Gulf Oil*, 330 U.S. at 508-09).

After balancing the *Myers* factors, the trial court granted Weyerhaeuser's motion to dismiss, stating that "[t]here is no question that many of the factors, both private and public, are either neutral or in favor of holding this trial in Arkansas." CP at 160. Indeed, the trial court determined that six of the ten factors favored an Arkansas trial and that the other four factors were neutral. The court did not conclude that a single factor favored a Washington trial.

The record supports the trial court's findings and its legal conclusion that Arkansas is a more appropriate forum for Sales's lawsuit. But this legal conclusion is meaningless if Weyerhaeuser removes the Arkansas state court action to federal court where it is then transferred to the Multi-District Litigation in Pennsylvania. We turn then to the question of whether the trial court had the power to enter a conditional dismissal and, if so, whether it abused its discretion in failing to do so.

IV. CONDITIONAL DISMISSAL ON INCONVENIENT FORUM GROUNDS

As previously stated, courts can decline jurisdiction when resolving the matter in another forum would better serve the parties' convenience and the ends of justice. *Johnson*, 87 Wn.2d at 579 (citing *Werner*, 84 Wn.2d at 370). Sales argues that the ends of justice will not be served if Weyerhaeuser removes the case to federal court because the case will end up in the federal asbestos Multi-District Litigation in the federal district court for the Eastern District of Pennsylvania.

Sales reasons that the trial court could have ensured a just result by conditioning dismissal on Weyerhaeuser's agreement to try the case in Arkansas state courts. He argues that the court erred in failing to acknowledge and exercise its legal authority to do so.

In dismissing Sales's case, the trial court voiced its concern that "the delays and inconvenience of handling this case through the system established by the [f]ederal [c]ourts in Pennsylvania[] would be a significant prejudice to [Sales]." CP at 161. It concluded that "it would be in the interest[] of justice to have this case tried in the county and location where the incident occurred, where the majority of the factual witnesses are located, and where [Sales] resides." CP at 161. Yet it believed that it could not "speculate on whether . . . this case would be removed to [f]ederal court . . . or [about] the status . . . of cases relating to this subject matter in the [f]ederal system." CP at 161. Moreover, it stated that it did not know of any law that would allow it to retain jurisdiction solely because of the potential delays if Weyerhaeuser removed the case to federal court.

A trial court has the discretion to decline jurisdiction where, in the court's view, "the difficulties of litigation militate for the dismissal of the action *subject to a stipulation that the defendant submit to jurisdiction in a more convenient forum.*" *Werner*, 84 Wn.2d at 370 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 84 (1971) and R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS, ch. 8 at 154-60 (1971)). Thus, a trial court may condition dismissal on a defendant's stipulation that it will submit to jurisdiction in the defendant's proposed adequate alternative forum. *See Wolf v. Boeing Co.*, 61 Wn. App. 316, 329-30, 810 P.2d 943 (1991) (the trial court has discretion to impose conditions in the order of dismissal for inconvenient forum) (citing *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876, 881 n.6 (5th Cir. 1987)), *overruled on other grounds by Hill*, 96 Wn. App. at 541 n.4; *see, e.g.*, *Werner*, 84 Wn.2d at 371 (conditioning

dismissal on stipulations that defendants submit to jurisdiction in California and not plead a lapse in the statute of limitations). Weyerhaeuser concedes that the trial court has discretion to condition dismissal on a defendant's stipulation that it will submit to jurisdiction in the defendant's proposed adequate alternative.

A court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 530, 20 P.3d 447 (2001) (citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). The trial court failed to recognize that it had the authority to condition dismissal on Weyerhaeuser's stipulation to try the case in the Arkansas state court system.

V. FEDERAL COURT & THE MULTI-DISTRICT LITIGATION

On July 29, 1991, the judicial panel on Multi-District Litigation (MDL Panel) issued *In re Asbestos Product Liability Litigation (No. VI)*, 771 F. Supp. 415 (Jud. Pan. Mult. Lit. 1991), and transferred 26,639 asbestos personal injury cases to that Multi-District Litigation proceeding in the Eastern District of Pennsylvania. As of January 2006, an additional 80,074 asbestos personal injury cases had been transferred to that proceeding. 28 U.S.C. § 1407 empowers the transfer of cases to Multi-District Litigation proceedings. That statute provides that "transfers shall be made [upon the MDL Panel's] . . . determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). Section 1407(a) states that the MDL Panel shall remand each transferred action "to the district from which it was transferred unless it shall have been previously terminated."

In 2002, the Rand Institute for Civil Justice issued a study on the current status of asbestos litigation in the United States. The Rand study stated that, as of 2002, approximately

73,000 of the 95,994 asbestos suits transferred to the Eastern District of Pennsylvania had been closed. But the study showed that of those 95,994 cases, the MDL panel remanded only 265 to their filing district for trial. Sales maintains that this shows that the Multi-District Litigation is a "procedural 'black hole'" where cases "languish indefinitely." Reply Br. of Appellant. at 14 n.2. He argues that due to the delays in the Multi-District Litigation proceeding, he will never have his day in court if Weyerhaeuser removes the case to the federal system.

Federal district courts from other jurisdictions have also voiced concerns about the efficiency and expediency of the Multi-District Litigation proceeding. *See In re Maine Asbestos Cases*, 44 F. Supp. 2d 368, 374 n.2 (D. Me. 1999) (if these claims remain in federal court, they will encounter significant delay upon their transfer through the Multi-District Litigation proceedings where no asbestos trials or discovery takes place in deference to global settlement efforts); *Madden v. Able Supply Co.*, 205 F. Supp. 2d 695, 702 (S.D. Tex. 2002) (there are thousands of asbestos cases pending in the Multi-District Litigation proceeding, and "if history be any indicator," keeping the claims in federal court will not increase efficiency and expediency). And Sales's counsel provided evidence that one of his clients, a mesothelioma victim, filed his case in August 2005, had his case transferred to the Multi-District Litigation in September 2005, and that as of July 2006, nothing further had happened in his case.

Weyerhaeuser offered testimony from G. Daniel Bruch, Jr., a Pennsylvania attorney who regularly defends asbestos claims. Bruch stated in his affidavit that when a plaintiff is in imminent danger of death, he has the opportunity to move his case promptly through the Multi-District Litigation system by submitting an affidavit detailing his condition, providing information for settlement evaluation, and requesting a settlement conference. Bruch said that the purpose of these settlement conferences is to determine quickly whether the parties can settle

the case or whether the MDL Panel should remand for trial. Bruch said that, in his experience, where the parties do not settle, the MDL Panel remands the case to the local federal court from which they originated.

In spite of Bruch's affidavit, Sales's evidence on the Multi-District Litigation, coupled with Weyerhaeuser's refusal to stipulate to Arkansas state court forum, compels us to conclude that Weyerhaeuser failed to establish that Arkansas was truly an adequate alternate forum.

The trial court could have solved this problem by requiring Weyerhaeuser to consent to trying the case in Arkansas state court as a condition of granting the dismissal. *See Werner*, 84 Wn.2d at 370-71. It abused its discretion in failing to do so. *See Demelash*, 105 Wn. App. at 530 (citing *Fisons*, 122 Wn.2d at 339) (a court abuses its discretion if it bases its ruling on an erroneous view of the law).

We reverse and remand with instructions that the trial court condition dismissal on Weyerhaeuser's stipulation to proceed in the Arkansas state courts.

Armstrong, P.J.

We concur:

Hunt, J.

Penoyar, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHARLES SALES and PATRICIA SALES, a married couple,

Appellants,

v.

WEYERHAEUSER COMPANY, a Washington corporation,

Respondent.

No. 35247-8-II

ORDER DENYING MOTION TO RECONSIDER

RESPONDENT moves for reconsideration of the court's decision terminating review, filed **April 24, 2007**. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Armstrong, Hunt, Penoyar

DATED this 22nd day of June, 2007.

FOR THE COURT:

PRESIDING JUDGE

Matthew Phineas Bergman
Bergman & Frockt
614 1st Ave Fl 4
Seattle, WA, 98104-2233

David S Frockt
Brian F. Ladenburg
Bergman & Frockt
614 1st Ave Fl 4
Seattle, WA 98104-2233

Elizabeth Pike Martin
Gordon Thomas Honeywell et al
1201 Pacific Ave Ste 2200
Tacoma, WA 98401-1157

John Wentworth Phillips
Phillips Law Group PLLC
315 5th Ave S Ste 1000
Seattle, WA, 98104-2682

John Matthew Geyman
Phillips Law Group PLLC
315 5th Ave.S Ste 1000
Seattle, WA, 98104-2682

Diane J. Kero
Gordon Thomas Honeywell
600 University St Ste 2100
Seattle, WA, 98101-4161

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th of July, 2007, I filed the original and one copy of Weyerhaeuser's Petition for Review in the above entitled matter with the Court of Appeals Division II along with the filing fee of $200 to the Supreme Court and caused to be delivered via legal messenger also on the 20th of July a copy of Weyerhaeuser's Petition for Review to the following:

Matthew P. Bergman
Bergman & Frockt
614 First Ave., 4th Floor
Seattle, WA 98104

John W. Phillips
Phillips Law Group
315 Fifth Ave. S.
Seattle, WA 98104

Dated this 20th day of July, 2007.

Jennifer Milsten-Holder, Secretary
Gordon, Thomas, Honeywell,
Malanca, Peterson & Daheim
1201 Pacific Ave., Suite 2100
P.O. Box 1157
Tacoma, WA 98401-1157

ORIGINAL